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IN THE

Supreme Court of the United States

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its affiliated LOCAL 6000,

Petitioners,

v.

DAVID FINK, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

DANIEL W. SHERRICK
General Counsel
GEORGI-ANN BARGAMIAN
Associate General Counsel
8000 East Jefferson
Detroit, Michigan 48214
(313) 926-5216

GEORGE B. WASHINGTON *
MIRANDA K.S. MASSIE
SCHEFF & WASHINGTON, P.C.
65 Cadillac Square
Suite 2900
Detroit, Michigan 48221
(313) 963-1921

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

* Counsel of Record

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QUESTIONS PRESENTED

Whether the respondent State officials violated the Fourth Amendment's ban on unreasonable searches by requiring a broad range of civil servants to submit to ongoing, random urine tests for unlawful drugs where there was no evidence of a drug problem among any segment of the employees to be tested and where none of the harms that the State asserted it wanted to minimize had ever occurred?

Whether the respondent State officials violated the Fourth Amendment's ban on unreasonable searches by requiring the same classifications of civil servants to submit to ongoing, random urine tests for alcohol, where there was no evidence that employees had worked while impaired by alcohol or that the normal methods of detection would be insufficient if employees did work while impaired by alcohol?

PARTIES

Petitioners are the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, and its affiliated Local 6000 (collectively referred to as the "UAW"). The UAW was the plaintiff in the district court and the appellant in the Sixth Circuit.

The respondents are officials of the State of Michigan who are sued in their official capacities. They are David Fink, the Director the Office of the State Employer; Janet Olszewski, the Director of the Department of Community Health; Patricia L. Caruso, the Director of the Department of Corrections; Thomas D. Watkins, Jr., the Superintendent of Public Instruction; and Major General Thomas G. Cutler, the Director of the Michigan Department of Military and Veterans Affairs.

The respondents Olszewski and Watkins were respondents in the Sixth Circuit. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure and Rule 35(3) of the Rules of this Court, as a result of changes in the officers of the State of Michigan, the respondent Fink has been substituted for Janine Winters, the respondent Caruso has been substituted for William Martin, and the respondent Cutler has been substituted for Major General G. Gordon Stump.

The respondents or their predecessors in office were defendants in the district court and appellees in the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

The UAW petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported at 385 F.3d 1003 (6th Cir. 2004). Apx. 1a. The decision of the United States District Court for the Western District of Michigan is reported at 336 F. Supp. 2d 686 (W.D.Mi 2003). Apx. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 2004. Apx. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND WORK RULE INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The State of Michigan drug and alcohol testing policy in question here is reproduced in the appendix. Apx. 36a.

STATEMENT OF THE CASE

A. Statement of Facts

The district court and the Sixth Circuit decided this case based upon an extended factual stipulation and declarations by the parties' respective expert witnesses.

In 1999, during the negotiations for a collective bargaining contract covering 20,000 professional and clerical employees of the State of Michigan, the respondents proposed mandatory urine testing for drugs and alcohol for six categories of employees.

The State did not make this proposal based upon any claim that there was an actually existing problem of drug abuse among the affected employees. In fact, as the Court of Appeals later found, there was "no evidence of a particularized or pervasive drug problem among the test-designated employees." Apx. 13a. In the 1990's, the State had never

accused a UAW-represented employee of delivering medical, counseling, or parole or probation services while impaired due to the use of drugs or alcohol. Nor had the State Department of Corrections, where many of the employees worked, accused a UAW-represented employee of attempting to smuggle drugs into a State correctional facility. Indeed, in the preceding decade, the Department had accused only one of the 2000 UAW represented employees in the Department of possessing drugs while on State property. Ct. Apx. Jt. Apx. 119, 112.[1]

Nor did the State propose the testing at issue here because its prior testing had revealed a latent problem that it wanted to abate. In the years before 1999, the State had conducted 39,000 drug tests, mostly under federally-mandated programs or in pre-employment screening. The 39,000 tests turned up 316 (.8 percent) positive results for marijuana and 67 (.17 percent) for cocaine, opiates, or amphetamines. Ct. App. Jt. Apx. 88, 91-92, 358-366, 383-389. There was no evidence that any of the persons who tested positive was impaired at work.[2]

Nor finally, did the State contend that existing sociological data as to any relevant group established that there was likely to be a drug problem among the affected employees. As Dr. John Morgan, an expert retained by the UAW, declared, the existing sociological data, including anonymous surveys by the National Institute of Drug Abuse, established that employed adults have one of the lowest rates of drug use in the population—with strong reason for believing that civil service professionals and clericals fell at the bottom of that already low spectrum. Ct. App. Jt. Apx. 213-214.

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[1] "Ct. App. Jt. Apx." refers to the Joint Appendix the parties submitted to the Sixth Circuit.

[2] The parties' experts agreed that the marijuana positives were, in the majority of cases, employees who had used marijuana occasionally in their off-duty time, with no discernible effect on work performance. Ct. App. Jt. Apx., 213-214, 1161.

As set forth in hearings in the State civil service system, which were made part of the record before the district court, the State insisted on the random testing not because of problems that had occurred but because state officials, led by a former Director of the State Department of Corrections, believed that problems *might* occur if employees worked in certain jobs while under the influence of drugs or alcohol. Specifically, the former Director, joined by a state medical administrator and an expert retained by state officials, testified that drug-impaired employees could cause accidents, could suffer security lapses, could deliver improper medical or psychological services, could be subject to blackmail, and could be candidates for importing drugs into the prisons (Ct. App. Jt. Apx. 1088-1104).

Solely on the basis of these asserted potential harms, the state Civil Service Commission approved the imposition of random drug and alcohol tests upon four broad categories of employees in the UAW bargaining units: [3]

> (2) A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.
>
> (3) A position in which the incumbent on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.

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[3] The Commission also imposed random tests upon Category (1), persons requiring a commercial driver's license; Category (6), persons who used hazardous or explosive materials; and Category (7), others agreed to in secondary negotiations. Apx. 37a-38a. As the UAW has never represented State employees who fell within Categories (1) and (6), those categories are not at issue in this petition. Nor is Category (7), since the parties have not agreed to add any other classifications. Nor finally are the reasonable suspicion, post-accident, follow-up, or preappointment aspects of the State's testing program at issue here. Apx. 38a-39a.

(4) A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, or parolees.

(5) A position in which the incumbent has unsupervised access to controlled substances.

Apx. 2a-3a.

Following the Civil Service Commission's imposition of a contract containing those four categories, the State officials designated 2850 employees whom they claimed fell within one or more of these categories. As the UAW had always agreed that the State could test the approximately 400 probation and parole officers who had elected to carry firearms during the performance of their duties, that left approximately 2450 employees in dispute.

By stipulation, the UAW and the respondents agreed that six functional groups of employees fell within the categories designated for testing:

(1) Approximately 650 parole or probation officers who had elected not to carry a firearm during the performance of their duties, all of whom were designated for testing under Category Two of the State's program;

(2) Approximately 675 athletic coordinators, chaplains, librarians, teachers, counselors, recreation and music therapists, clericals, and similar classifications who delivered non-health care services within the state correctional facilities, all of whom were designated for testing under Category Three of the State's program;

(3) Approximately 450 nurses and occupational therapists who delivered medical services in the state correctional facilities, all of whom were designated for testing under Categories Two and Three of the State's program, and a few of whom were also designated for testing under Category 5 of the State's program;

(4) Approximately 175 psychiatrists, psychologists, social workers and similar employees who delivered mental health counseling in the state correctional facilities, all of whom were designated for testing under Categories Two and Three of the State's program;

(5) Approximately 225 physicians, nurses, dentists, occupational therapists and similar employees who delivered medical services in the State's institutions for the mentally ill and the developmentally disabled, all of whom were designated for testing under Category Three and a few of whom were also designated for testing under Category 5; and

(6) Approximately 200 psychiatrists, psychologists, mental health social workers and similar employees who delivered psychological services in the State's institutions for the mentally ill and the developmentally disabled, all of whom were designated for testing under Category Three and a few of whom were also designated for testing under Category 5.

The State began testing these employees on March 1, 2001. It took urine samples under the protocols promulgated by the United States Department of Health and Human Services. Both male and female employees were required to urinate with a monitor standing outside the stall, except in those cases where the monitor had reason to suspect that an individual might alter or substitute a specimen, in which case the monitor could directly observe the employee's urination Apx. 40a; HHS Guidelines Sec 2.2 (e) and (f)(9), Ct. App. Jt. Apx. 316-317.

The State program requires that no more than 15 percent of the employees provide samples each year for drug or alcohol testing. If an employee refuses to take a test, provides an adulterated sample, tests positive for any one of five unlawful drugs, or tests positive for alcohol above a specified level, the employee is subject to discipline up to and including discharge. Apx. 41a-42a.

During the period for which there is record evidence as to the results under this program, the State required 634 employees in the UAW units to submit to random drug testing and 488 to submit to random alcohol testing. Five employees tested positive for marijuana, three for cocaine, and four for alcohol above the specified level. Ct. App. Jt. Apx. 1025-1028. There was no evidence that any of these employees had worked while impaired.

The State, however, terminated all of those who tested positive for drugs and disciplined all of those who tested positive for alcohol.

B. The decisions of the district court and of the Sixth Circuit.

The UAW brought suit against the testing program in the United States District Court for the Western District of Michigan.

On the basis of the record described above, the district court granted the State's motion for summary judgment and upheld the random drug and alcohol testing of all of the employees at issue. The court did not analyze the specific nature of the claimed need for testing employees in any of the categories at issue—nor did it specifically analyze how the particular testing regime would address any aspect of those claimed special needs. Instead, the court summarily concluded:

> Here, it is clear that the State's justifications for random drug and alcohol testing are much more akin to those presented in *Von Raab* than *Chandler*. Although it cannot be said that all of the *Von Raab* justifying circumstances apply to any of the instant test-designated positions, some of them apply to each of the identified categories.
>
> Apx. 28a, citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) and *Chandler v. Miller*, 520 U.S. 305, 313 (1997).

After conceding that there was no evidence of an existing drug problem, the district court held that the State need not wait until a substantial portion of the employees in question began using drugs before it was allowed to institute a testing program designed to deter drug use. Apx. 28a, citing *Board of Education v. Earls*, 536 U.S. 822, 836 (2002). The district court found that privacy interests were minimal and asserted, again summarily, that the "public safety concerns" implicated in this case were ". . . much stronger than both those presented and found wanting in *Chandler* and those presented and found sufficient in *Earls*." On that basis the district court approved the random drug testing program. Apx. 29a, 34a-35a.

The district court offered no separate analysis as to why the State's alcohol testing program was needed—and, in particular, it offered no reason for concluding that the normal methods for detecting the abuse of alcohol were insufficient.

The Sixth Circuit affirmed, adopting essentially the same reasoning and citing the same precedents as the district court. After acknowledging that "there [was] no evidence of a particularized or pervasive drug abuse problem among the test-designated employees," the Circuit held that it was "well-established that the existence of a pronounced drug problem is not an essential element to the finding of a special need" and that the "need to deter and prevent a substantial harm provides the necessary immediacy for the imposition of a testing program". Apx. 13a, citing *Earls*, 536 U.S. at 836 and *Von Raab*, 489 U.S. at 674-675. Like the district court, the Sixth Circuit set forth in summary form the "substantial harm" that it believed constituted a special need justifying the tests:

> It is certainly true that employees who either have 1) law enforcement duties, 2) direct and unsupervised contact with prisoners, 80 percent of whom have a history of drug abuse, or 3) a responsibility to deliver health care or psychological services to persons in state custody,

> would pose a significant threat to the health and safety of themselves and others if they use drugs or were under the influence of drugs while on duty.
>
> Apx. 14a.

Apart from this brief passage, the Sixth Circuit neither identified the factors creating the special need for the testing, nor analyzed how the particular testing program would address that special need. Like the district court, the Sixth Circuit offered no separate analysis as to the special need for the random testing for alcohol.

Having found a special need, the Sixth Circuit found that all of the employees in question worked in highly-regulated fields and thus had diminished expectations of privacy. The Sixth Circuit further found that the method of collecting the urine samples was less intrusive than the "negligible" interference with privacy found in this Court's decision in *Vernonia School Dist 47J v. Acton*, 515 U.S. 646 (1995). Apx. 15a. It concluded that the "unrelenting scrutiny" and repeated "unsettling shows of authority" inherent in a random and continuous program of testing did not change its calculus that the asserted benefits from the drug and alcohol-testing program outweighed the invasion of the employees' privacy. Apx. 15a. It therefore held that the program was lawful as to all of the employees that the State had identified for testing. Apx. 16a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS BY THE SUPREME COURT OF ARIZONA, BY A PANEL OF THE FIFTH CIRCUIT, AND BY OTHER COURTS ON THE CRUCIAL ISSUE OF WHEN THE GOVERNMENT MAY REQUIRE RANDOM DRUG TESTING BASED UPON AN ASSERTED SPECIAL NEED TO DETER HARMS THAT HAVE NOT BEEN SHOWN TO EXIST.

This case squarely presents the question of which public employees may be required as a condition of their employment to undergo random, ongoing urine drug testing on the sole basis of harms that public officials have asserted could occur as a result of the use of unlawful drugs—where there is no evidence that any of those harms has in fact occurred.

The importance of the question presented is self-evident. In place of the normal requirement for individualized suspicion, the Sixth Circuit has not only allowed the State to engage in random searches, it has allowed it to do so in circumstances where there is no evidence that the harms that State officials claim to envision have occurred or are at all likely to occur in the future.

The question presented concerns numerous clerical, professional and other public employees across the country. Employed adults have one of the lowest rates of drug usage in the population. Many, perhaps most, workplaces are like that of the State of Michigan—a very small minority of employees uses unlawful drugs; most of those use marijuana occasionally in their off-duty time; and the number of employees using "harder" drugs at any time is a fraction of one percent.

Yet even in these workplaces, where the incidence of on-the-job impairment is extremely low, it is not difficult for public officials—acting, in most cases, in good faith—to demand testing because they can envision harms that could hypothetically result if employees worked while impaired. If those envisioned harms are, in general, sufficient to justify the testing, there is a tendency for random testing to spread--and for larger numbers of innocent employees to be subjected to such tests, with the attendant invasion of privacy, resentment, and dilution of Fourth Amendment interests that necessarily follow.

The federal courts of appeals and the supreme courts of the various states are sharply divided over the circumstances in which the States may require random drug testing on the basis of harms that have not actually occurred.

The lower courts begin, of course, with the basic framework of analysis that this Court has established. Urine drug testing is a search, and, in the absence of individualized suspicion, the government may not subject employees to that search unless it establishes that the tests would further "special needs beyond the normal need for law enforcement" in a manner that outweighs the invasion of privacy caused by the particular program of testing at issue. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 619 (1989); *Von Raab*, 489 U.S. at 665-666; *Vernonia,* 515 U.S. at 653; *Chandler*, 520 U.S. at 313; *Earls*, 536 U.S. at 829.

But if these precedents established the basic framework for analysis, they did not answer the question presented here. In every case save *Von Raab*, this Court found that a special need existed *only* when the government demonstrated that there was an existing drug problem among the targeted group that might be lessened by the particular testing regime that the government proposed. See *Skinner*, 489 U.S. at 607-608 (post-accident tests for railway employees); *Vernonia,* 515 U.S. at 649-650, 662-663 (ongoing random tests for high-

school athletes); *Earls*, 536U.S. at 834-835 (ongoing random tests for students participating in extracurricular activities).

Moreover, even in *Von Raab*, the Court held only that the government could require employees seeking a position as a Customs Agents to take a drug test at the time of their promotion based solely upon harms that could occur in the performance of that job as the result of the use of unlawful drugs. The majority certainly suggested that there were other employees who could be tested on this basis—but it did not define who those employees might be. *Von Raab*, 489 U.S. at 677-678.

Indeed, in *Von Raab*, this Court was sharply divided over precisely that question. Justices Scalia, Stevens, Brennan and Marshall declared that even Customs Agents should not be tested in the absence of evidence that there was an actually existing need for that testing. *Id,* 489 U.S. at 679-680 (Marshall and Brennan, JJ, dissenting), 683 (Scalia and Stevens, JJ, dissenting). In the view of these four dissenters, the government "perhaps" had the right to require such tests in the absence of an existing drug problem only if the "work-place at issue could produce such catastrophic social harm that no risk whatever is tolerable." *Id.*, at 684 (Scalia, J, dissenting).

As Justice Scalia's dissent forecast, in the wake of *Von Raab*, some public officials cited harms that could occur but had not occurred as justifications for imposing random tests upon wider categories of citizens. In *Chandler*, however, this Court halted that development by striking down a Georgia statute that required candidates for public office to take a drug test. The Court brushed aside Georgia's claim that harms could result from the use of unlawful drugs by public officials, declaring that "[n]othing in the record hints that the hazards respondents describe are real and not simply hypothetical." *Id.*, at 319. By a decisive majority, this Court declared that *Von Raab* was "hardly a decision opening broad

vistas for suspicionless searches," but was instead a decision that "must be read in its unique context" of the duties and dangers faced by the Customs Agents. *Id.*, at 321.[4]

In *Chandler*, the Court held that "a demonstrated problem of drug abuse" was not "necessary in all cases"—but other than by making clear that *Von Raab* should not be extended beyond the "unique context" in which it was decided, the Court did not define the category or categories of cases where such proof was not necessary.

Nor, finally, did the opinions in *Earls* define that category or categories. In that case, the Court approved a school district's plan to test students participating in extracurricular activities, despite the fact that the drug problem in the district in question was less than that that had existed in the Court's prior decisions. Both Justice Thomas and Justice Breyer explicitly premised their opinions on the high rate of drug use (and of hard drug use in particular) among young people in the Nation as a whole. *Earls,* 536 U.S. at 836 (Thomas, J) and 839 (Breyer, J). Both also explicitly premised their opinions on the well-established principle that "Fourth Amendment rights are different in the public schools than elsewhere" and both sustained the tests in question because they were not a condition for continued enrollment in the district and because conscientious objectors could opt out of the testing by not participating in extracurricular activities. *Id*, 536 U.S. at 829-830, 833 (Thomas, J); 536 U.S. at 841-842 (Breyer, J).

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[4] The Court held that "Customs employees, more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use." *Chandler*, 520 U.S. at 321 (internal citations and quotations omitted). Their primary mission was drug interdiction and they not only had access to "vast sources of valuable contraband" but had been "the targets of bribery by drug smugglers on numerous occasions." *Id.* (internal citations and quotations omitted).

Taken together, *Von Raab*, *Chandler*, and *Earls* do not define when public employers may impose one-time or, still less, ongoing tests as a condition of employment without evidence of a preexisting drug problem. In the absence of guidance from this Court, the lower courts have split badly on this issue.

Before the instant case, the Sixth Circuit held that the public schools could require a one-time drug test from all persons seeking to be hired, transferred or promoted into a teaching position even though it found that there was "little, if any evidence of a pronounced drug or alcohol abuse problem among [the district's] teachers or other professional employees." *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361, 374 (6th Cir. 1998), *cert. den.* 528 U.S. 812 (1999). In the instant case, the Sixth Circuit, acting under the claimed authority of *Von Raab* and *Earls*, vastly broadened *Knox County* by summarily holding that in the absence of any evidence of an existing drug problem, the State could require ongoing random tests from employees performing a broad range of duties under widely varying degrees of observation and supervision.

On the other hand, applying precisely the same precedents, the Supreme Court of Arizona held just months before that the City of Mesa had violated the Fourth Amendment rights of its firefighters by subjecting them to random, unannounced drug tests because "[t]he absence of evidence of drug use, at least as reflected in this record, provides no basis for us to conclude that random, suspicionless testing is calibrated to respond to any defined risk." *Peterson v. City of Mesa*, 207 Ariz. 35, 39, 83 P.2d 35, 39 (2004), *cert.den.* ___U.S. ___, 125 S.Ct. 51 (2004). The Court explicitly rejected the claim that the testing could be justified under *Von Raab*, finding that the firefighters' duties and supervision were unlike those of the Customs Agents. *Id.*, 207 Ariz. at 40, 83 P.3d at 40. It rejected as well the claim that the testing could be justified

under *Earls*, finding that firefighters "have little in common with students entrusted to the government's care." *Id.*

As firefighters face more danger than *all* of the employees at issue here—and less direct supervision and observation than *most* of the employees at issue here—the decision of the Sixth Circuit conflicts directly and obviously with the decision of the Supreme Court of Arizona.

In addition to the direct conflict between the Sixth Circuit and the Supreme Court of Arizona, the Fifth Circuit and Tenth Circuits are internally divided over the precise issue presented here. In its first decision on the scope of permissible testing in the absence of any evidence of a drug problem, the Fifth Circuit held that the public schools could not require tests from teachers involved in a work-related accident because there was no evidence of a "demonstrated reality" that established the need for such testing:

> As destructive as drugs are and as precious as are the charges of our teachers, special needs *must rest on demonstrated realities*. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a "kind of immolation of privacy and human dignity in symbolic opposition to drug use. . ."
>
> *United Teachers v. School Bd through Holmes*, 142 F.3d 853 (5th Cir.. 1998) (Wisdom), citing *Von Raab*, 489 U.S. at 681 (Scalia, J, dissenting).

In a later decision, however, a different panel of the Fifth Circuit held that the State could require ongoing random testing of teachers because of dangers that "could" occur if a teacher was using unlawful drugs. *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998). Judge Dennis strongly dissented from that holding because of the absence of any evidence that there was a significant drug abuse problem among the teachers. *Id.*, at 569-570 (Dennis, dissenting).

In striking down a program to test mechanics, a panel of the Tenth Circuit divided over the same issue. The panel unanimously struck down the particular testing program because it found that one-time tests would not deter drug use by mechanics. But only two judges found that the state had established the requisite special need without proving that a problem existed. *19 Solid Waste Department Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1075-1076 (10th Cir. 1998). Judge Briscoe strongly dissented from the panel majority's claim that the state could establish a special need for testing mechanics without producing evidence that there was an existing drug problem among the mechanics. *Id.*, at 1075-1076.

The decision by the Sixth Circuit in this case also conflicts directly with a decision by the Colorado Court of Appeals, where that Court, citing *Chandler*, held that *Von Raab* was a "singular case that uniquely justified departure from the general requirement that the government provide evidence of past drug use" in order to establish the requisite special need for testing. *Timm v. Reitz*, 39 P.3d 1252, 1258 (Colo. Ct. App 2001)(striking down plan to test dog trainers). Similarly, the Sixth Circuit decision conflicts in principle with a decision by the Ohio Supreme Court striking down a workers' compensation statute that encouraged employers to undertake drug testing, where the Ohio Supreme Court declared that this Court had held that random drug testing was constitutional only where the targeted group had "a demonstrated history of abuse," where the positions were "unique," or where the positions had the "potential for creating risks of catastrophe" if an employee were under the influence of a mind-altering substance. *State ex rel Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation*, 97 Ohio St.3d 504, 512, 780 N.E.2d 981, 990 (2002).

Finally, in an exhaustive opinion striking down the random testing of police and firefighters under the Constitution of

Alaska, the Supreme Court of that State declared that it could not determine whether under *Chandler* and *Von Raab* the ongoing random testing of police and firefighters would violate the Fourth Amendment in the absence of any evidence of a drug problem among those employees. *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P 3d 547, 547 (Alaska Sup. Ct. 2001).[5]

As is apparent, there is a sharp split and great uncertainty over when the government may require random tests of its employees in the absence of any evidence of a preexisting drug problem—an uncertainty that the Sixth Circuit has deepened in this case by its expansive misreading of this Court's opinions in *Von Raab* and *Earls*. Apx. 13a-14a.

As first stated in Justice Scalia's dissent in *Von Raab*, the issue on which the lower courts have split is of crucial significance. If the government must, in general, demonstrate a concrete danger of drug abuse before instituting random testing, then the courts have a basis for judging whether a particular testing program is justified. On the other hand, if the government generally needs to show only that officials can envision ways in which a drug-impaired employee could cause harm, then there is no objective basis for judgment—and the door is opened to "men of zeal" intent, in the best of good faith, on eliminating every possible danger by subjecting ever widening circles of employees and citizens to random testing.

This Court has warned of precisely that danger.[6] To abate that danger the Court has directed the lower courts to

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[5] See also *Guiney v. Police Comm'r of Boston*, 411 Mass 328, 582 NE 2d 523 (1991) (striking down random tests of police and firefighters under state Constitution where no evidence of abuse shown).

[6] "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. . ." *Von Raab*, 489 U.S. at 687 (Scalia, J, dissenting), and *Chandler*, 520 U.S. at 322, (Ginsburg, J), citing *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J, dissenting).

"examin[e] closely" the proffered special need, with particular attention to whether the danger the State asserts actually exists. *Chandler*, 520 U.S. at 314, 319. Neither the circuit nor the district court did that.

This case presents an excellent record on which to abate the danger of the spread of drug testing based on merely hypothetical needs—and to resolve the split in the lower courts.

The record is undisputed—there is no evidence of a preexisting problem among the employees to be tested, nor is there such evidence for the employees in the UAW units, in the state workforce, or in civil service professionals and clericals generally.

Moreover, the record is broad. None of the employees at issue have duties remotely approaching those of Customs Agents.[7] And among the six groups of affected employees, the duties and degrees of supervision and observation vary widely, ranging from physicians to social workers in the state hospitals to nurses, teachers and chaplains in the State's prisons, to probation and parole officers who work in offices and in the field.

The record thus presents the Court with a clean, broad slate on which to draw the line where drug testing may be imposed upon public employees in the absence of any evidence that there is a drug problem among those employees.

The UAW asks that this Court grant its petition to assure that the same line is drawn in Michigan, Arizona and across the Nation The UAW further asks this Court to draw that line

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[7] The probation and parole officers are the only employees at issue who have duties that are remotely comparable to those of Customs Agents. By definition, however, they are not on the front line of the Nation's effort to stop the illegal importation of drugs, but are instead in the rear echelon of the State's effort to deal with a vast range of offenders whom the State has deemed safe enough to be at large in the community.

in a manner that ensures that civil servants working in offices or workplaces where there is no evidence that drug abuse is an actual problem are not compelled, absent extraordinary circumstances, to undergo repeated, ongoing searches based on nothing other than public officials' belief that a danger might hypothetically exist, where no danger whatsoever has been shown to exist in reality.

II. THE DECISION OF THE SIXTH CIRCUIT DIRECTLY CONFLICTS WITH A DECISION BY THE SUPREME COURT OF ARIZONA AND WITH DECISIONS BY THE NINTH AND DISTRICT OF COLUMBIA CIRCUIT COURTS ON THE ISSUE OF WHETHER ONGOING RANDOM DRUG TESTING OF EMPLOYEES REQUIRES A GREATER SHOWING OF SPECIAL NEED THAN ONE-TIME TESTING LIKE THAT APPROVED IN *VON RAAB*.

This case also squarely presents the question as to whether ongoing random tests of employees may be justified by the same evidence and analysis that the Court has used for one-time tests.

In *Von Raab*, of course, this Court approved only the one-time tests of Customs Agents at the time they were promoted. In approving those tests, the Court cited the one-time nature of the tests as "significantly minimiz[ing] the program's intrusion on privacy interests." Id., 489 U.S. at 672 n.2. As the Court held, employees were "notified in advance of the scheduled sample collection, thus reducing to a minimum any unsettling show of authority . . . that may be associated with unexpected intrusions upon privacy." *Von Raab*, 489 U.S. 672 n.2 (internal quotations and citations omitted).

Apart from this telling observation of the distinction between one-time and ongoing tests, this Court has not decided or even considered the standards that govern ongoing random

testing of public employees. The lower courts have split dramatically over that issue as well.

The Arizona and Alaska Supreme Courts found that there was a "qualitative," decisive difference between ongoing random testing and testing that occurred at the point of employment, promotion, transfer, or accident. Both supreme courts explicitly held that they would strike down ongoing testing on the basis of evidence that was sufficient to justify one-time tests. *Peterson,* 207 Ariz. at 35, 83 P.3d at 35, citing *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P 3d 547, 557 (2001).

Similarly, the Ninth and the District of Columbia Circuits—and the Sixth Circuit in *Knox*—found that the ongoing random nature of a drug testing program was a factor that weighed *against* its validity in ways that might be decisive in a particular case. *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989), *cert. den. sub. nom. Bell v. Thornburgh*, 493 US 1056 (1990); *Bluestein v. Skinner*, 908 F.2d 451, 456-457 (9th Cir. 1990), *cert. den.* 498 U.S. 1083 (1991); *Knox County*, 158 F.3d at 380.

But the Tenth Circuit reached a diametrically opposite conclusion. As described above, it struck down a program requiring mechanics to be tested when they obtained their commercial driver's license because the ". . . mechanic can easily evade detection merely by detoxifying his system prior to the tests." That is, it held that the one-time nature of the test was a factor that weighed against the program's validity. *19 Solid Waste Mechanics*, 156 F.3d at 1074.

In its most recent decision, the Sixth Circuit split the difference. After acknowledging that random, continuous testing was more intrusive, the Sixth Circuit held that the greater intrusion was "offset by the fact that such tests are also more efficacious than one time tests . . . at deter[ing] and prevent[ing] drug use to protect public safety and health."

Thus, it held, the fact that the tests "are conducted on a random and continuous basis does not change our calculus" in sustaining the drug testing program at issue. Apx. 15a.

The facts in all of these cases are substantially identical. But the Supreme Courts of Arizona and Alaska and three circuits have held that the absence of an ongoing random testing program is a decisive factor in approving drug testing; the Tenth Circuit has held that it is a decisive factor in rejecting drug testing; and, in its most recent decision, the Sixth Circuit has held that the ongoing nature of the program makes no difference at all.

As public officials and the citizens should know whether an ongoing component to the testing is a factor that weighs against the validity of the testing, for the validity of the testing, or one that makes no difference, this Court should grant review and establish the standards that govern the ongoing random testing of public employees.

III. THE SIXTH CIRCUIT IMPROPERLY APPROVED THE STATE'S RANDOM ALCOHOL TESTING PROGRAM.

Apart from the one-time, post-accident alcohol tests approved in *Skinner*, this Court has never considered whether the State may implement a random alcohol testing program.

At first glance, there is a substantial similarity between alcohol and drug testing in that both alcohol and unlawful drugs can clearly impair work performance. But there is, in fact, a decisive difference between the need for the two types of testing. The use of alcohol can be detected by sight, smell and sobriety tests—while the use of drugs cannot be detected by those methods.

Neither the district court nor the Sixth Circuit even considered this difference. It is important, not only in its own right, but for its general significance. From the beginning,

courts considering drug testing have rightly been concerned with the possibility of mission creep—that is, that testing for unlawful drugs could expand into testing for a variety of medical conditions and personal decisions that are none of the employer's business.

Before the lower courts, without analysis, approve the expansion of random, ongoing testing for drugs into random, ongoing testing for alcohol, this Court should establish the parameters for determining whether that expansion is warranted under the Fourth Amendment.

CONCLUSION

For the reasons stated, the petitioners request that this Court grant the writ of certiorari to the Sixth Circuit.

Respectfully submitted,

DANIEL W. SHERRICK
General Counsel
GEORGI-ANN BARGAMIAN
Associate General Counsel
8000 East Jefferson
Detroit, Michigan 48214
(313) 926-5216

GEORGE B. WASHINGTON *
MIRANDA K.S. MASSIE
SCHEFF & WASHINGTON, P.C.
65 Cadillac Square
Suite 2900
Detroit, Michigan 48221
(313) 963-1921

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

* Counsel of Record

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